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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 1854

COLONIAL PIPELINE COMPANY,
a corporation of the State of Delaware,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, LAW DIVISION (CRIMINAL), MIDDLESEX COUNTY [1]

In its opposition to Colonial's Petition for Writ of Certiorari, New Jersey has asserted, for the first time in this case, that Colonial may not avail itself of the protection afforded by the double jeopardy clause of the Fifth Amendment to the United States Constitution because Colonial is a corporation. This position on the part of New Jersey is not only erroneous, but is in direct contradiction of the position which the State took before the

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[1] Colonial joins in the Reply Brief In Support Of Petition For Writ Of Certiorari filed with this Court on behalf of petitioner, Ben D. Leuty, and makes that Reply Brief a part hereof as if incorporated herein in full.

Supreme Court of New Jersey in its Supplemental Memorandum filed with that Court in this case wherein it asserted, at page 3:—

> "These Defendants in the case at bar have already been once placed in jeopardy and are now in a position to urge double jeopardy."

The aforesaid Supplemental Memorandum, also at page 3 thereof, conceded that even if the initial federal indictment was ultimately voided because of the improper empanelment of the grand jury which returned such indictment, the federal trial in respect of such indictment would nevertheless have placed the defendants in the case at bar ". . . in federal jeopardy." New Jersey suggests no authority whatever for its only lately adopted position that corporate defendants may not assert the protection of the double jeopardy clause. Except for its cavalier treatment of the specific holding of the United States District Court for the Southern District of California [2] that a corporation is entitled to such protection, New Jersey suggesting that such holding was nothing more than ". . . some off-hand comments by a California District Court." [3], New Jersey fails to consider the various authorities which support the right of a corporation to assert such protection. The additional suggestions set forth in New Jersey's Brief in Opposition to the within Petition are without merit:—

1. New Jersey points out that in *Bartkus v. Illinois*, 359 U.S. 121 (1959), Mr. Justice Black included words in his

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[2] *United States v. Armco Steel Corporation*, 252 F. Supp. 362 (S.D. Cal. 1966).

[3] Brief on Behalf of New Jersey in Opposition to Petition for Writ of Certiorari, Point II, p. 16.

dissenting opinion which pertained only to natural persons. The short and obvious answer to this argument is that only a natural person, namely Alfonse Bartkus, was involved in the *Bartkus* case and it would, therefore, have been passing strange for any other form of reference to have been included in the opinion. Equally obvious, moreover, is the fact that Mr. Justice Black was using words such as "man" and "people" in their generic senses, in this context, to mean the accused. Otherwise, New Jersey could argue that women may not assert the right not to twice be placed in jeopardy by virtue of Mr. Justice Black's references to "man"; and the reference by Mr. Justice Black, *id.* at 151, to a quotation containing the word "accused" would be inexplicable. To state the argument here advanced by New Jersey is to refute it.

2. New Jersey points out that it has been held [4] that the Fifth Amendment privilege against self incrimination does not apply in favor of corporations. This is conceded. Neither the argument nor the concession, however, has any relevance to the issue presently before the Court.

The position of New Jersey is inconsistent with judicial precedent and suggests a startling departure from the generally understood application of the double jeopardy clause of the Fifth Amendment. Precedent and compelling logic require the conclusion that corporations are entitled to constitutional protection from being put twice in jeopardy for the same alleged violations of the identical statute by the same conduct.

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[4] *Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968).

ARGUMENT

New Jersey Erred In Its Argument That Corporate Defendants May Not Invoke The Protection Of The Double Jeopardy Clause Of The Fifth Amendment.

A. *Judicial precedent establishes that corporations are "persons" within the meaning of the double jeopardy clause of the Fifth Amendment of the United States Constitution and have standing to invoke its protection.*

It is well established, and no case has been found wherein the principle is challenged, that corporations may invoke the protection of the Fifth Amendment's double jeopardy clause. The ruling of this Court in *American Tobacco Company v. United States*, 328 U.S. 781, 787 (1946) must be taken to stand for this principle. In the *American Tobacco case*, the corporate petitioner raised on appeal the question of whether its convictions under different sections of the *Sherman Anti-Trust Act*, 15 USC §§1 *et seq.* violated its right not to be placed in double jeopardy. The Court ruled that petitioner had not been placed in double jeopardy, thereby implicitly holding that corporations have the right to invoke the protection of the double jeopardy clause and will receive the protection of its provisions in appropriate cases. See also *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969, 976 (10th Cir. 1970), *cert. denied* 400 U.S. 829 (1971); *United States v. American Oil Co.*, 1969 *Trade Cases*, ¶72,759 (D.N.J. 1969), *appeal dismissed* 1969 *Trade Regulation Reports*, No. 420 (3rd Cir. 1969), *cert. denied* 396 U.S. 845 (1969); *United States v. American Honda Motor*

Co., 273 F. Supp. 810, 815 (N.D. Ill. 1967); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 982 (N. D. Cal. 1967) (cases collected, *id*, at 982); *United States v. General Electric Company*, 40 F. Supp. 627 (S.D.N.Y. 1941). Even the decision of the trial court in the case at bar [5] assumes that corporations may assert the protection against double jeopardy.

In addition to these implicit holdings, lower Federal courts have specifically held that the double jeopardy clause applies to corporations. *United States v. Armco Steel Corporation*, 252 F. Supp. 364 (S.D. Cal. 1966); *United States v. H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D. Md. 1966) (without discussion of the question). The Courts of New Jersey have held to the same effect. *State v. Pennsylvania Railroad Co.*, 9 N.J. 194, 87 A.2d 709 (1952); *Board of Health, Borough of Hillsdale v. Tandy & Allen, Inc.*, 29 N.J. Super. 61, 101 A.2d 617 (County Ct. 1953); and see, citing *Tandy & Allen* with approval, *Englewood v. Geo. M. Brewster & Son, Inc.*, 77 N.J. Super. 248, 186 A.2d 120 (App. Div. 1962).

The determination that corporations are "persons" within the meaning of the double jeopardy clause, and thus entitled to its protection, demonstrates recognition of the fact that corporations are, for such purposes, much more than mere legal entities or "fictitious" persons. Corporate capital is an aggregation of individual capital. The corporate framework embodies the aspirations and investments of individual shareholders. An injury to the corporate entity must, therefore, inevitably produce injury to the individual shareholders. The court in *Armco*, *supra*, emphasized this point when it held:—

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[5] Appendix B to Colonial's Petition for Writ of Certiorari filed with this Court.

> "[E]ither directly or indirectly ultimately persons own all corporations and thus 'persons' must ultimately suffer whatever penalties are imposed upon the corporations[.] [I]t seems *beyond doubt to me that the constitutional jeopardy extended to 'persons' includes corporation. . . .*" *Id.* at 368 (emphasis supplied).

The decisions that corporations are protected by the double jeopardy clause and the *rationale* for so protecting them conform to a long line of United States Supreme Court cases which grant to corporations the same constitutional protections as are afforded to natural persons. Corporations are, for example, protected by the Fourth Amendment safeguards against unreasonable search and seizure and cannot have their property taken without just compensation. See *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The Supreme Court has held on many occasions that corporations are "persons" within the meaning of the Fourteenth Amendment to the United States Constitution and are thus entitled to due process and to equal protection of the laws. See, for example, *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949); *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886).

B. *The State of New Jersey has not suggested any compelling need to deprive corporations of their constitutional right to invoke the protection of the double jeopardy clause.*

Courts have deviated from their policy of affording corporations the same constitutional protection as that afforded to natural persons in only one area, that being the Fifth Amendment right against self incrimination.

Here, the courts have apparently felt that state authorities have a compelling right to examine corporate records and documents in order to properly exercise their power to supervise and to regulate corporations. This exceptional state power was recognized by Mr. Justice Brown, writing for the Court in *Hale, supra:*—

> "There is a reserved right in the legislature to investigate its (the corporation's) contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." *Id.* at 75.

Mr. Justice Brown also stated, however, *id.* at 76, that

> "In organizing itself as a collective body it (the corporation) waives no constitutional immunities appropriate to such body."

He thus emphasized that corporate loss of the Fifth Amendment privilege against self incrimination was due only to the special needs of the State. State authorities cannot demonstrate a similar compelling need to deprive corporations of their right to be free from double jeopardy and have not, in the case at bar, even suggested any such need. The right against being put twice in jeopardy for the same alleged conduct resulting in the same alleged offense does not impede the state's right to regulate and to investigate corporate activities. The vindication of such governmental authority does not, in a civilized society, permit Colonial to be subject, after being already once

indicated and tried, to the ordeal of facing both a federal retrial [6] (in respect of the *second* Federal indictment returned against it) and a new State trial on new indictments for the same alleged violations of the identical statute by the same alleged conduct.

C. *Corporations have the same needs as individuals for finality in the judicial process and are thus entitled to protection from being placed twice in jeopardy for the same alleged violations of the identical statute by the same conduct.*

One of the principal protections afforded by the Constitutional guarantee against being put in double jeopardy is the security of knowing that the State can never again retry for the same alleged offense. *Green v. United States*, 355 U.S. 184, 187-188 (1957); *see also United States v. Jorn*, 400 U.S. 470 (1971). The security created by protection from such jeopardy is as important to corporations as it is to individuals. No interest of the prosecuting authority requires dilution of the principle in the case of corporate defendants. A corporation may find it impossible to plan its future activities when it is continually faced with the threat of fresh litigation and the inevitable consequence of enormous expenditures of corporate money and energy. Colonial has already been put to a ten-week trial in the initial federal prosecution; it faces the threats of an additional federal prosecution and the New Jersey prosecution which is the subject hereof. The adverse consequences in terms of future planning and expense are very real and create a compelling reason to *preserve* the corporate right to invoke the protection of the double jeopardy clause. It is conceivable that without

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[6] Petitioner contends that such a federal retrial would be unlawful.

such protection the prosecuting authority could litigate a corporation to "death." It would controvert the purpose of the Double Jeopardy Clause as well as basic safeguards of due process of law to place such power in the hands of prosecuting authorities.

CONCLUSION

For the foregoing reasons, Petitioner prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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